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NOTICE UNDER § 2479 OF THE CODE.

HISTORY OF THE STATUTE.

It is generally conceded that notice by a subcontractor to the owner under § 2479 of the Code of 1904 may be given before and during performance; but whether or not such preliminary notice can be given after performance is a matter of repeated contention.

The first enactment on the subject is found in the Acts of 1869-70, p. 444, C'. 294, § 3. It was incorporated, without change, in the Code of 1873, Ch. 115, § 5, and reads as follows:

"Any subcontractor or workman, and any person contracting to furnish materials about a building or other improvement for a general contractor, or other person than the owner, may give notice in writing to the owner of such building or other improvement, stating the *probable value* of the labor *to be* performed or materials *to be* furnished, and if such subcontractor, workman, or supplier of materials, *shall afterwards* perform such labor, etc."

There can be no doubt of the fact that this language permitted notice to be given only before performance.

This statute was amended in 1874 (Acts, 1874-5, p. 437) to read as follows:

"Any subcontractor or any person contracting to furnish materials about a building or other improvement, for a general contractor, or other person than the owner, may give notice in writing to the owner of such building or other improvement, *stating the value of the labor performed or materials furnished,* etc."

Under this amendment the Supreme Court plainly held that notice could be given only after performante. Roanoke, etc., Co. *v.* Carn, 80 Va. 596; S. V. R. R. Co. *v.* Miller, 80 Va. 828; and N. & W. R. R. Co. *v.* Howison, 81 Va. 130.

The statute was again amended and preliminary notice dispensed with altogether. Acts, 1883-4, p. 636.

The statute was revised and adopted in the Code of 1887 as § 2479.

"§ 2479. Any subcontractor may give notice in writing to the owner or his agent *before performing work for or furnishing materials to a general contractor, stating the probable value of the work to be done or materials to be furnished;* and if such subcontractor shall *afterwards perform such work or furnish such materials, and the said materials are used in the construction, repair or improvement of such building or structure, and shall* at any time after the work done, etc."

It was finally amended (Acts, 1893-4, p. 523) to read as follows:

"§ 2479. Any subcontractor may give notice in writing to the owner or his agent, *stating the nature and character of his contract and the probable amount of his claim,* and if such subcontractor shall at any time after the work done or materials furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be personally liable to the claimant for the amount *due to said contractor by said general contractor*: provided, the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given *or may thereafter become indebted by virtue of his contract with said general contractor."*

The italicized words show what was eliminated from the section as it stood in the Code of 1887, and what was substituted or added in the amendment of 1893-4.

That prior to the amendment of 1893-4 notice could be given only before performance, is beyond dispute; that it was within the purpose of the amendment to permit the giving of notice also during performance, is conceded; but whether or not the language of the amendment allows notice to be given after performance, is a subject upon which there are conflicting opinions. And

to resolve the doubt, resort must be had to the principles and rules of statutory construction.

OBJECT OF AMENDMENT OF 1893-4.

Mr. Blackstone says there are three points to be considered in the construction of all remedial statutes—"the old law, the mischief, and the remedy—that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this michief. . . ." Ryan *v.* Krise, 89 Va. 732.

In the same case the court said: "The reason of the law—that is, the motive which led to making of it—is one of the most certain means of establishing the true sense."

All statutes *in pari materia* should be read and construed together, as if they formed parts of the same statute and were enacted at the same time. Com. *v.* School Board of Norfolk, 109 Va.

Applying these principles, we find that the old law (Code, 1887) permitted the subcontractor to give notice *before* performance (§ 2479), and also *at any time after* performance (§§ 2475-77), but plainly withheld the right to give notice *during* performance. His remedy was complete before performance and adequate after performance; but in the interim, regardless of the length of time, the subcontractor could not protect himself, either by rendering the owner personally liable or by acquiring a lien upon his property. The general contractor could have obtained partial or full settlement from the owner in the very presence of the subcontractor, who would have been remediless unless he had entirely completed his contract. Frequently the necessity for notice did not appear until the subcontractor had begun to do work or furnish material. During performance was the vital period; but notice could not be given then—and therein lay the *mischief to be cured.*

Was the language of the amendment co-extensive with the evil, or of broader scope? Twice in its history the statute had allowed notice before performance, and once had it permitted it after performance, but never during performance; and to accomplish the latter new phraseology had to be employed. Such terms as "before performing work," "to be done," "to be fur-

nished," and "shall afterwards perform" had to be eliminated, for they clearly confined the time for giving notice to *before performance*. Assuming for the present that the legislature endeavored to adopt a single phrase which would apply to both *before* and *during* performance and yet exclude *after* performance, does the language of the amendment, read according to the ordinary and grammatical sense of the words, conform to that intention?

As noted the old language was struck out, and "the nature and character of his contract and the probable amount of his claim" substituted. It must be admitted that the new phrase imports futurity, else notice could not now be given until after performance. But is there any clear implication of the past tense? Why state "the nature and character of his contract," if the work is complete and the account rendered certain? There is good reason for stating it before and during performance—it is due the owner—but after performance the matter of interest is, not the contract, but a "correct account of his claim." Does "probable amount of his claim" express more than futurity? Eliminate the adjective—the subcontractor cannot state the "amount of his claim" before he has even begun work, for then he has no claim; nor can he state the full amount during performance. But he can state the "probable amount of his claims" before and during performance. Likewise he cannot state the "probable amount of his claim" after performance, for then the amount is no longer "probable" or dependent upon action, but is determined, certain, and a matter to be stated as a "correct account." "Probable" is not synonymous with approximate, but rather with conjectural. We approximate *what is,* and conjecture *what will be.*

The word "probable" as denoting futurity has received legislative approval twice in this very statute. In the original enactment of 1869-70, we find "probable value of the labor to be performed," and in the Code of 1887 "probable value of the work to be done"—an interpretation which cannot be escaped, since the legislature is presumed to have used the word in the amendment without change of meaning.

In Roanoke, etc., Co. *v.* Carn, *supra,* the court said, in considering the amendment of 1874-5: "But the law as amended

omits the word 'probable' and the words *to be* before the words performed and furnished, as regards respectively the labor and the materials. The amendment excludes the idea of notice in anticipation of either, and avoids any conjectured estimate, but provides for notice only of what has been done in either regard;" and again in N. & W. R. R. Co. *v.* Howison, *supra,* in speaking of the subcontractor: "He is no longer authorized to give notice of the *probable* value of the labor *to be* performed and materials furnished. He is now authorized to give notice of the value of the labor actually performed. . . ." It is fair to assume that the converse is true of the statute in its present form.

NOTICE AFTER PERFORMANCE—ITS CONSEQUENCES.

It may be contended that there is no ground for assuming that the mischief of the old law did not extend to the lack of the right to give notice after performance. What would be the result of a construction permitting notice after performance? For example: O lets contract to G for the erection of a frame dwelling with basement for $5,000, to be paid, $1,000 upon completion of excavation and brickwork, $3,000 when building is ready for plasterers, balance when house is finished.

G contracts with A for excavation and brickwork at $1,000, with B for erection of building at $3,000, and with C for plastering and painting at $500, A, B and C to furnish materials.

When A completes his contract, G receives $1,000 from O but fails to settle with A, and A at once serves notice on O; then B notifies O and proceeds with his contract; C does likewise. The house is completed and A, B and C call on O for settlement but find that he has only $4,000 in hand.

Conceding, and especially since the decision of Schrieber *v.* Bank, 99 Va. 257, that under this section subcontractors have priority among themselves in the order in which they give notice, A, although having virtually lost by delay the compensation paid by O for his labor and material, comes first, B next, and C gets nothing. Or had C given notice before B, then B would lose $500; and if B had been negligent as was A, C would get nothing.

So B and C, to be safe, must have entered into their respective contracts with G and must have given notice to O before A had

completed his contract. The same rule is that any subcontractor should be safe, if he gives notice before the completion of his work, and certainly if he gives notice before he begins work. In this simple example there are several chances for hardship, and in each case not the negligent but the innocent is made to suffer; while, if notice be required before and during performance to give priority, such risks are avoided.

As said by the court in Bristol, etc., Co. *v.* Thomas, *infra,* the purpose of the law was "to secure to a deserving class of men the fruits of their labor." And to allow a subcontractor to stand idly by and see the compensation for his labor or material pass from the owner to the general contractor, and then secretly obtain priority over other subcontractors, who, perhaps, have not even begun to perform their contracts, partakes of a policy of unfairness and opens up avenues for collusion between subcontractor and general contractor not to be tolerated.

Surely such consequences warrant the application of the rule enunciated in Immigration Society *v.* Commonwealth, 103 Va. 51, where the court cites with approval from Sutherland on Stat. Const., §§ 323, 324, as follows: "While the effects and consequences of a statute cannot influence the courts in construing it, where the intention of the legislature is clear, yet the argument of inconvenience, absurdity, injustice, or prejudice to the public interests may be considered by the courts in construing a statute when its language is ambiguous or uncertain and doubtful."

STATUTES IN PARI MATERIA.

To assume that the mischief of the old law extended to not being able to give notice and claim priority after performance, is to assert that the provisions of §§ 2475-77 were inadequate and that the legislators, fully aware of the fact, failed to clearly and directly remove that defect. Sections 2477, 2479 and 2484 were amended practically at the same time. Acts, 1893-4, pp. 523, 576.

The revisors of 1887 made the two remedies harmonious and equally fair to all by restricting notice to obtain priority under § 2479 to *before performance,* by imposing for the first time upon subcontractors, who might elect to wait and resort to the remedy adapted to notice *after performance,* the equity of sharing pro

rata (§ 2484), and by limiting the liability of the owner to the amount due or to become due the general contractor.

The two provisions are still harmonious and equitable, if notice under § 2479 be limited to before and during performance; but, if such notice be extended to after performance, the subcontractor must share pro rata under §§ 2475-7, and at the same time shall have priority under § 2479. The policy of reconciling statutes *in pari materia* was recently emphasized in Com. *v.* School Board of Norfolk, *supra,* as follows: "One of the well-settled rules of construing statutes is, that all statutes *in pari materia* should be read and construed together, as if they formed parts of the same statute, and were enacted at the same time; and where there is a discrepancy or disagreement among them, their different provisions, as far as possible should be reconciled, and such interpretation given as that all may stand together."

OTHER VIEWS.

Mr. Manson, in 2 Va. L. Reg. 505, in discussing § 2479 in its present form, says: "It appears that the statute now contemplates notice before the completion of the work or the furnishing of the material, since the amount of the claim, after the completion of the work, would no longer be a *probable* amount, but it is by no means certain that a notice that found the owner with funds in his hands due the general contractor would be held bad, because it came after the completion of the work or the furnishing materials." And in Pollard's Code Bien. 1908, p. 241, the author in commenting on the conclusion of Special Master Jackson Guy, in Brumbaugh *v.* Jefferson Hotel Co., that " 'probable' connected with the giving of the notice in the first part of the statute, followed just afterwards by 'and . . . after the work done or materials furnished . . . shall serve the sworn account' denotes a sequence of time in the order of the two events," says: "The use of the word 'probable' does not necessarily indicate that notice must be given before the completion of the work but only that it may be given at that time."

These expressions of doubt may be removed by application of the following principles:

The general rule is, that a legislative act should be read according to the ordinary and grammatical sense of the words. Price *v.* Harrison, 31 Gratt. 118.

The presumption is that the legislature does not intend to change or modify the law beyond what it declares, either in express terms or by unmistakable implication. 26 Am. and Eng. Enc., page 649 and cases cited.

In commenting upon the construction by the courts of the statutes of the several states in Phillips on Mechanics' Liens, the author says: "If they bore with unnecessary severity upon others in favor of the mechanics, and palpable injustice resulted, they have uniformly declared they should not be aided by construction, and a strict interpretation should be placed upon the laws. If, on the other hand, they have secured the laborer the result of his toil and capital, with a due regard to the rights of all, constant expressions are to be found in the reported cases, declaring they should be favored." This language is cited without criticism in Bristol, etc., Co. *v.* Thomas, 93 Va. 401.

Can it be said that a construction permitting notice before, during and after performance is in accord with the ordinary and grammatical sense of the words, or that it is the result of unmistakable implication, or that its consequences as shown by the preceding example are "with a due regard to the rights of all?"

In 15 Va. L. Reg. 2, Mr. Shelton is of the opinion that, "it is fair to assume that the dignity of a 'claim' exists only as to an executed contract, but that the amount is uncertain—'probable'—until approved by the general contractor, owner, and architect, when it becomes a sum certain. If 'probable' be construed in connection with 'amount of his claim,' it loses the suggestion of futurity and denotes the present tense." If this construction of "probable" be correct, notice can now be given only after performance as under the Acts of 1874-5.

Taking into consideration the history of the statute, the apparent defect of the law of 1887 as the object of the amendment of 1893-4, the language of that amendment, the inequitable consequences of permitting notice after performance, and the reconciling of statutes *in pari materia,* it must be concluded that under § 2479 in its present form notice can be given only before and during performance. This interpretation, and none other, meets the requirements of reason and statutory construction.

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